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Supreme Court, U.S.
FILED

No. 03 181 AUG 6 - 2003

IN THE

Supreme Court of the United States

LIEUTENANT COLONEL PATRICIA C. PHILLIPS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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August 2003

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QUESTION PRESENTED

Whether the court below created a new–and equally improper–variant of the service-connection test rejected by this Court in *Solorio v. United States*[1] when the court below held that Title 10, Section 802, conferred court-martial jurisdiction over a reserve officer when she traveled to a military installation in preparation for her annual active-duty tour.

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[1] 483 U.S. 435 (1987).

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The petitioner, Lieutenant Colonel Patricia C. Phillips, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in her case on May 13, 2003.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Phillips,* 58 M.J. 217 (2003), is located at Appendix A, 1a-8a. The opinion of the United States Air Force Court of Criminal Appeals, *United States v. Phillips,* 56 M.J. 843 (A.F. Ct. Crim. App. 2002), is located at Appendix B, 9a-21a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 13, 2003.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress has the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8, cl. 14. Congress has specified the jurisdiction under which persons can be tried in Article 2 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 802. Article 2(a)(1) provides jurisdiction over reservists who are "lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it."[3]

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[2] Appendix B, p. 2a.

[3] In addition, Article 2(a)(3) provides jurisdiction over reservists on "inactive-duty training," a provision not at issue in this case.

Specifically at issue in this case, Article 2(c) further confers court-martial jurisdiction on a person serving with an armed force who:

(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications ... at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties.

STATEMENT OF THE CASE

On May 1, 2000, the petitioner was tried by a general court-martial. The petitioner pled guilty to using marijuana, making a false official statement about her marijuana use and engaging in conduct unbecoming an officer by soliciting another officer to provide urine to substitute for her own for urinalysis testing. The facts surrounding the marijuana-use charge give rise to this petition.

The petitioner was a reservist attached to a medical unit at Wright-Patterson Air Force Base (AFB), Ohio. Pursuant to the Reserve Order activating her to perform her annual active-duty tour, the petitioner was required to report for duty at 7:30 a.m. on July 12, 1999, and was to be released on July 23, 1999. The petitioner–along with three brownies containing marijuana–traveled from her home in Pittsburgh, Pennsylvania, on July 11, 1999. She departed Pittsburgh at noon and arrived at Wright-Patterson AFB at 4:30 p.m. later that day.

The petitioner then checked into the Visiting Officers' Quarters (VOQ) at Wright-Patterson AFB. The petitioner

ate the marijuana brownies in her VOQ on Wright-Patterson AFB on that day, July 11, 1999.

Pursuant to her Reserve Order, the petitioner was authorized to use one day–July 11, 1999–for travel. The petitioner received base pay, certain monetary allowances, and one reserve retirement point[4] for traveling on July 11, 1999. The petitioner reported for duty at 6:30 a.m. on July 12, 1999, and was released from duty at 3:30 p.m. on July 23, 1999.

At trial, the petitioner challenged whether the court-martial had proper jurisdiction over her for her marijuana use. On appeal, the Air Force Court of Criminal Appeals held that the petitioner's court-martial did have proper jurisdiction over her marijuana use because the petitioner "voluntarily undertook a duty to travel from her home to Wright-Patterson AFB." Appendix B, p. 15a. The petitioner appealed further, and the United States Court of Appeals for the Armed Forces granted review.[5] On May 14, 2003, the United States Court of Appeals for the Armed Forces also held that the petitioner's court-martial had proper jurisdiction over her marijuana use because she "voluntarily" performed a "duty" by traveling. Appendix A, p. 8a.

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[4] Reserve retirement points are a measure of military service credit, the accumulation of which can lead to receiving future retirement pay.

[5] That court granted review on the following issue:

> WHETHER A COURT-MARTIAL HAS *IN PERSONAM* JURISDICTION OVER A RESERVIST'S CONDUCT THAT OCCURS ON A TRAVEL DAY PRECEDING HER ANNUAL ACTIVE-DUTY TOUR.

United States v. Phillips, 57 M.J. 428 (2002) (journal).

REASONS FOR GRANTING THE WRIT

This petition presents this Honorable Court with the question whether Congress intended an expansive definition of military duty under subsection (c) of Article 2. Specifically, did Congress intend to confer jurisdiction over persons serving with an armed force only for military duties–such as those the petitioner was called to perform beginning on July 12, 1999, the first day of her tour–or did Congress intend to also include any potential act *connected* to their military service?

In *Solorio v. United States*, 483 U.S. 435 (1987), this Court made it clear that Congress, and Congress alone, determines the nature and extent of court-martial jurisdiction. *Id.* at 446 (observing that Article I, Section 8, Clause 14, vests "in Congress ... authority to make rules for the government of the military."). If "Congress has the primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military," *id.* at 447, then this Court should not allow an expansion of court-martial jurisdiction beyond the clear language of Article 2.[6]

This Court long ago observed that "[t]he words, 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience." *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717 (1861), *overruled on*

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[6] This requirement for a clear Congressional grant of court-martial jurisdiction also comports with this Court's observation that "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to '*the least possible power adequate to the end proposed.*' " *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (emphasis in original) (citing *Anderson v. Dunn*, 6 Wheat. 204, 230-31, 5 L. Ed. 242 (1821)).

other grounds in Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987). Thus, a duty is an obligation a person is *required* to meet, or a duty can dictate an act one is *required* to do.

The court below impermissibly expanded the reach of subsection (c). For jurisdiction to be proper, Congress required that a person "perform[] military duties." The plain language of this statute and the ordinary–and legal–meaning of the word "duty" indicate that Congress intended that the person perform a *required* act. The court below thus wrongly held that the petitioner's *voluntary* act of traveling on July 11, 1999, was a military duty.[7] To the contrary, her first military duty (*i.e.*, the first act she was required to perform) was to report on July 12, 1999.

The court below also cited to legislative history in a manner that doesn't reveal the true context of the report cited. Although the court quoted a relevant portion of the Senate Report indicating that "[t]he new subsection is not intended to affect reservists," Appendix A, p. 6a, the court below understated that the entire purpose of this subsection was to "provide[] for jurisdiction based upon a constructive enlistment." S. Rep. No. 96-197 at 122. Thus, the purpose of subsection (c) is to expand jurisdiction over individuals who submit to military authority for the first time or submit to military authority anew following a break in service. *See*,

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[7] The fact that the petitioner received a reserve retirement point and military pay and allowances for her travel time does not prove that her travel was a military duty. If this were the case, Congress would not have required separate proof of both military pay and performance of military duties under Article 2(c). Moreover, there is a rational basis for paying a reservist in this circumstance. The further away a reservist lives from the duty location to which the reservist is called, the more time the reservist's service takes away from the reservist's civilian employment. Therefore, military pay for time spent traveling can compensate a reservist for civilian income lost due to geographic separation.

e.g., *United States v. King*, 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959). Given the strong statement of Congressional intent that subsection (c) is not intended to apply to reservists and given the numerous specific provisions elsewhere within Article 2 that directly apply to reservists, it is even more clear that the court below misapplied subsection (c).

This erroneous interpretation of a federal statute alone calls for granting the petition for a writ of certiorari in this case. However, there is another critical reason to grant the petition for a writ of certiorari. The military depends quite heavily on its citizen-soldiers. For Fiscal Year 2003, the reserve components comprise almost forty percent of all military forces. Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. No. 107-314, Div. A, Title IV, Subtitle A, § 401, 411, 116 Stat. 2458 (2002). In the current era, the President has made the members of the reserve components available to serve on active duty for up to twenty-four months. Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (2001). In this context of frequent and heavy activation of reserve forces, this issue becomes a more important federal question that should be settled by this Court.

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces expands court-martial jurisdiction beyond that clearly intended by Congress. The petitioner asks that this Honorable Court grant review in order to reinforce a true duty-status test as Congress intended.

The petitioner therefore respectfully requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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August 2003

Appendix A

UNITED STATES, Appellee

v.

Patricia C. PHILLIPS, Lieutenant Colonel
U.S. Air Force, Appellant

No. 02-0657

Crim. App. No. 34147

United States Court of Appeals for the Armed Forces

Argued February 5, 2003

Decided May 13, 2003

CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE, EFFRON, BAKER, and ERDMANN, JJ., joined.

Counsel

For Appellant: *Lieutenant Colonel Brandon Burnett (argued); Colonel Beverly B. Knott, Major Kyle R. Jacobson, and Major Terry L. McElyea (on brief); Major Jeffrey A. Vires.*

For Appellee: *Lieutenant Colonel William B. Smith (argued); Lieutenant Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain C. Taylor Smith (on brief); Colonel Anthony P. Datillo.*

Military Judge: *William E. Orr, Jr.*

Chief Judge CRAWFORD delivered the opinion of the Court.

Pursuant to her plea, Appellant was convicted of making a false official statement, wrongfully using marijuana, and conduct unbecoming an officer by seeking a substitute urine sample, in violation of Articles 107, 112a, and 133, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 907, 912a, and 933 (2000). The convening authority approved a sentence of dismissal and confinement for 45 days. The Air Force Court of Criminal Appeals affirmed the findings and sentence, *United States v. Phillips*, 56 M.J. 843 (A.F. Ct. Crim. App. 2002), and we granted review of the following issue:

> WHETHER A COURT-MARTIAL HAS *IN PERSONAM* JURISDICTION OVER A RESERVIST'S CONDUCT THAT OCCURS ON A TRAVEL DAY PRECEDING HER ANNUAL ACTIVE-DUTY TOUR.

For the reasons set forth below, we affirm.

FACTS

At trial, as on appeal, Appellant contended that the armed forces did not have personal jurisdiction over her at the time of one of the three offenses of which she was convicted – the charge of wrongful use of marijuana "at or near Wright-Patterson Air Force Base, Ohio, between on or about 11 July 1999 and on or about 16 July 1999." Appellant has not challenged jurisdiction over the remaining offenses. In the course of rejecting Appellant's motion, the military judge identified the following as uncontested facts:

> Lieutenant Colonel Patricia C. Phillips is a member of the United States Air Force Reserve and has been a member of the Reserve since 28 April of 1989, without a break in

service. During all the times relevant, Lieutenant Colonel Phillips was a member of the Air Force Reserves.

Lieutenant Colonel Phillips was assigned as a reservist to the 9019th Air Reserve Squadron, Denver, Colorado, as an Individual Mobilization Augmentee. As an IMA, Lieutenant Colonel Phillips is attached to the 74th Medical Group, Wright-Patterson Air Force Base, Ohio. Pursuant to Reserve Order JA 17747, dated 24 June 1999, Lieutenant Colonel Phillips was ordered to perform her annual tour. The orders required Lieutenant Colonel Phillips to report to duty at 0730 hours on 12 July 1999, and to be released on 23 July 1999. Lieutenant Colonel Phillips departed Pittsburgh, Pennsylvania at 1200 hours on 11 July 1999 and arrived at Wright-Patterson Air Force Base, Ohio at 1630 hours on 11 July 1999.

Pursuant to Reserve Orders JA 17747, one-day travel was authorized on 11 July 1999. Lieutenant Colonel Phillips received one point in travel pay for 11 July 1999. Additionally, she received base pay, basic allowance for quarters, and basic allowance for subsistence for 11 July 1999. Lieutenant Colonel Phillips reported for duty at 0630 hours on 12 July and was released from duty on 1530 hours on 23 July 1999.

During the week of 12 July 1999, Lieutenant Colonel Phillips was selected for random urinalysis. She provided a sample. The sample tested positive for tetrahydro-cannabinol, with a THC level of 148 nannograms per milliliter. The alleged drug use occurred on 11 July 1999, after she arrived at Wright-Patterson Air Force Base, Ohio.

After the military judge denied the jurisdictional motion, Appellant entered a plea of guilty. During the plea inquiry, Appellant agreed to the admission into evidence of a stipulation of fact, which contained detailed information

about the circumstances of her offenses, including the following information regarding the use of marijuana:

On 11 July 1999, the Accused drove from her home in Pittsburgh, Pennsylvania, to Wright-Patterson Air Force Base, Ohio, where she checked into lodging at the Wright-Patterson Air Force Base Visiting Officers' Quarters (VOQ) that same day. On her trip to Wright-Patterson Air Force Base, Ohio, the Accused brought with her three brownies containing marijuana. On 11 July 1999, after checking in to her VOQ, the Accused ate the marijuana brownies in her VOQ on Wright-Patterson Air Force Base, Ohio. At the time she consumed the brownies, the Accused knew that the brownies contained marijuana, that substance she was consuming was marijuana, and that she had no legal justification or authority to use marijuana at the time she used it. The Accused knew the brownies contained marijuana because the Accused had previously purchased the marijuana on a street corner in Pittsburgh, Pennsylvania and because she subsequently made the marijuana brownies herself, for her own use and consumption.

The stipulation also described selection at random to participate in the drug-testing program on July 16, her unsuccessful attempt on July 16 to persuade another officer to provide a substitute urine sample, her provision of the sample, and the subsequent positive test result.

During the military judge's personal colloquy with Appellant during the plea inquiry, Appellant added:

On the 11th of July I drove from Pittsburgh, Pennsylvania to Wright-Patterson Air Force Base for my active-duty tour and I brought marijuana on base. I checked in, I ate those brownies on the 11th of July, and I reported to duty at seven-thirty, July 12, 1999.

In response to a question from the military judge, Appellant confirmed that she consumed the marijuana on base in the Visiting Officers' Quarters. Other uncontested evidence submitted during trial demonstrated that Appellant, who was born in 1951, entered the Air Force in 1989, was successively promoted to Lieutenant Colonel, and met mental and minimum age qualifications under 10 U.S.C. §§ 504 and 505 (2000).

DISCUSSION

"Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the [UCMJ]." *United States v. Ernest*, 32 M.J. 135, 139 (C.M.A. 1991). *See also Solorio v. United States*, 483 U.S. 435 (1987). "Status in the armed forces for purposes of court-martial jurisdiction is generally governed by Article 2 [of the UCMJ]." *United States v. Cline*, 29 M.J. 83, 85 (C.M.A. 1989)(citing United States v. Cole, 24 M.J. 18 (C.M.A. 1987)). Article 2(c), UCMJ, 10 U.S.C. § 802(c)(2000), states:

> Notwithstanding any other provision of law, a person serving with an armed force who--
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to the military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

The foregoing provision was added to Article 2 in 1979. Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 801, 93 Stat. 803, 811 (1979). The legislative history indicates that the amendment was primarily enacted to ensure that court-martial jurisdiction would not be defeated by assertions that military status was tainted by recruiter misconduct. *See* S. Rep. No. 96-197, at 121-22 (1979). The legislative history also makes it clear that the four-part test for active service applies to circumstances — such as those present in *United States v. King*, 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959) -- not involving defective enlistments. S. Rep. No. 96-197, at 122. In describing the scope of the legislation, the Senate Report observed:

> The new subsection is not intended to affect reservists not performing active service or civilians. It is intended only to reach those persons whose intent it is to perform as members of the active armed forces and who met the four statutory requirements. It thus overrules such cases as *United States v. King*, [*supra*]. An individual comes within new Subsection (c) whenever he meets the requisite four-part test regardless of other regulatory or statutory disqualification.

Id. at 122-23.

The statute, by its express terms, establishes a specific analytical framework. First, the person must be "serving with an armed force" at the pertinent point in time. The phrase "serving with" an armed force has been used to describe persons who have a close relationship to the armed forces without the formalities of a military enlistment or commission. *See* Article 2(10), UCMJ; Article XXXII, American Articles of War of 1775, *reprinted in* William Winthrop, *Military Law and Precedents* 956 (2d ed. 1920).

The question of whether a person is "serving with" the armed forces is dependent upon a case-specific analysis of the facts and circumstances of the individual's particular relationship with the military, and means a relationship that is more direct than simply accompanying the armed forces in the field. *See, e.g., United States v. Garcia*, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954); *United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952).

Second, the statute provides that a person serving with the armed forces also must meet the four-part test. Merely serving with the armed forces as a reservist or a civilian is not sufficient to establish jurisdiction under Article 2(c). *Compare* Articles 2(a)(3), 2(d) (jurisdiction over reservists not on active duty in specified circumstances).

Finally, the statute provides that once a person meets the four-part test, the individual retains status as a person in "active service," *see* 10 U.S.C. § 101(d)(3), until released under applicable laws and regulations.

Applying the first step of the analysis to the present case, Appellant's status as a person "serving with" the armed forces on July 11, 1999, is established by the following uncontested facts: (1) on that day, she was a member of a reserve component of the armed forces; (2) she traveled to a military base on that day pursuant to military orders, and she was reimbursed for her travel expenses by the armed forces; (3) the orders were issued for the purpose of performing active duty; (4) she was assigned to military officers' quarters, she occupied those quarters, and she committed the pertinent offense in those quarters; (5) she received military service credit in the form of a retirement point for her service on that date; and (6) she received military base pay and allowances for that date.

In terms of the second step of the analysis, Appellant's status on July 11 as a person in active service under the four-part test in Article 2(c) is established by the following uncontested facts: (1) Appellant submitted voluntarily to military authority; (2) Appellant's date of birth and record of service reflected that there was no issue as to whether she met the mental and minimum age qualifications under 10 U.S.C. §§ 504 and 505 (2000); (3) as noted in connection with the first step, she received military pay and allowances for her service on that date; and (4) her military duty on that day, which she voluntarily agreed to perform, was to travel to the base preparatory to report to a specific organization on July 12. She performed that duty. The fact that her orders did not require her to report to a specific organization until July 12 does not detract from her voluntary performance of the duty, pursuant to orders, to travel on July 11. Finally, it is uncontested that during the period in question, she was not released pursuant to law or regulation.

Under these circumstances, Appellant was subject to military jurisdiction on the day of travel to her active-duty site at the time of her offense.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Lieutenant Colonel PATRICIA C. PHILLIPS
United States Air Force

ACM 34147

23 April 2002

Sentence adjudged 1 May 2000 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: William E. Orr Jr. (sitting alone).

Approved sentence: Dismissal and confinement for 45 days.

Appellate Counsel for Appellant: Lieutenant Colonel Brandon Burnett (argued), Colonel James R. Wise, Lieutenant Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Kyle Jacobson.

Appellate Counsel for the United States: Lieutenant Colonel William B. Smith (argued), Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Mitchel Neurock.

Before

SCHLEGEL, ROBERTS and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

ROBERTS, Judge:

The appellant, a reservist, was convicted, pursuant to her pleas, of making a false official statement, wrongfully using marijuana, and conduct unbecoming an officer by wrongfully and dishonorably soliciting a junior officer to provide a urine sample for her (the appellant) to submit as her own, in violation of Articles 107, 112a, and 133, UCMJ, 10 U.S.C. §§ 807, 912a, 933. The approved sentence includes a dismissal and confinement for 45 days. The appellant avers on appeal that the court-martial lacked in personam jurisdiction over her wrongful use of marijuana, because she used it on the travel day prior to the start of her two-week active duty tour. We disagree and affirm.

FACTUAL BACKGROUND

The appellant was a reserve nurse, Individual Mobilization Augmentee, attached to the 74th Medical Group, Wright-Patterson Air Force Base (AFB), Ohio. She had 10 years' experience in the reserves, which included duty in Saudi Arabia during Operation Desert Storm. In her civilian capacity, the appellant worked as an operating room nurse in Pittsburgh, Pennsylvania.

The appellant was ordered to perform her annual, two-week tour pursuant to Reserve Order JA 17747, dated 24 June 1999. The order directed her to report for duty at 0730 on 12 July 1999 and released her from duty on 23 July 1999. The orders authorized one travel day for her to get to her duty station at Wright-Patterson AFB. The appellant left Pittsburgh at approximately noon on 11 July 1999 and checked into government quarters at Wright-Patterson AFB

at approximately 1630. She stayed in government quarters that evening and throughout her tour. According to the appellant, that evening she ate three brownies containing marijuana that she brought to Wright-Patterson AFB. She admitted to baking the brownies before leaving Pittsburgh.

On 16 July, the appellant was selected for random urinalysis testing. She reported for the urinalysis test and went into a bathroom with a urine collection container. While in the bathroom, she ran into Second Lieutenant (2Lt) Nance, a nurse who had just finished Officer Training School. The appellant asked 2Lt Nance to provide a urine sample for her, but 2Lt Nance was unable to do so. The appellant insisted, but 2Lt Nance refused to help her. The appellant eventually provided her own sample, which tested positive for marijuana.

During her next reserve tour, on 16 September 1999, a two-day, inactive duty training (IDT) tour, Air Force Office of Special Investigations (AFOSI) special agents questioned the appellant about her marijuana use. After proper rights advisement, which the appellant waived, she gave a sworn statement in which she stated that she had a party in her home on 10 July and that a guest brought brownies containing marijuana to the party. The appellant later admitted that this was a false statement and that she was the one who made the brownies and brought them with her to Wright-Patterson AFB.

ANALYSIS

The appellant claims that the Air Force did not have in personam jurisdiction over her use of marijuana because her active duty tour did not begin until 0001 hours, 12 July. The question of in personam jurisdiction is one of law that we

review de novo. *United States v. Melanson*, 53 M.J. 1, 2 (2000).

Articles 2(a) and (c), UCMJ, 10 U.S.C. § 802(a), (c) are the primary statutory provisions authorizing jurisdiction over reservists in the Ready Reserve. *Willenbring v. Neurauter*, 48 M.J. 152, 159 (1998). Congress first enacted Articles 2(a) and (c) in 1950. *Id.* Congress expanded jurisdiction over reserve personnel in the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 804, 100 Stat. 3906-07 (1986). Those changes reflected a congressional intent to "conform the UCMJ to the total-force policy by subjecting members of the reserve components in Federal status to the same disciplinary standards as their regular component counterparts." *Willenbring*, 48 M.J. at 169 (citing H.R. Rep. No. 718, 99th Cong. 2d Sess., 225 (1986)). Prior to the 1986 changes, UCMJ jurisdiction did not extend to cases in which a reservist committed a violation of the UCMJ and completed a specific period of duty before disciplinary action under the UCMJ could be taken. *See Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986); *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984); *United States v. Dale*, 23 M.J. 598 (A.F.C.M.R. 1986). We review these provisions in turn.

Article 2(a)

Article 2(a)(1) extends UCMJ jurisdiction over "persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it."

We find that the appellant was subject to UCMJ jurisdiction on 11 July under Article 2(a)(1), because she was a person "lawfully called or ordered into . . . duty in or for training . . . from the dates when [she was] required by

the terms of the call or order to obey it." Art. 2(a)(1), UCMJ. She was called to active duty, pursuant to 10 U.S.C. § 10147(a)(1), in order to fulfill the requirement that members of the Ready Reserve "serve on active duty for training of not less than 14 days (exclusive of travel time) during each year." But, her orders provided her a choice. She could have been called to duty on the date she was required to start her training, 12 July, or she could have exercised her option to take a day of travel and be called to duty on 11 July. The appellant chose the latter option.

Citing 10 U.S.C. § 10147(a)(1), Judge Pecinovsky insists that the Air Force did not have jurisdiction over the appellant. That statute provides that members of the Ready Reserve are required to "serve on active duty for training of not less than 14 days (exclusive of travel time) during each year." Judge Pecinovsky opines that because the statute excludes travel time from active duty, an offense committed during travel must be non-active duty time. We disagree.

The statute, 10 U.S.C. § 10147(a)(1), does not provide a basis for jurisdiction. It does not dictate that travel time is not or cannot be active duty time. It merely establishes a training requirement for members of the Ready Reserve. Congress requires members of the Ready Reserve to perform a minimum of 14 days of annual training a year, but exeludes travel days from fulfilling any of that training requirement. We find nothing that suggests Congress intended this training requirement to limit UCMJ jurisdiction over a reservist to only those 14 training days. Congress did not grant reservists a blanket exemption from UCMJ jurisdiction during travel days.

Judge Pecinovsky also concludes that we are adopting a "departure for duty" as the "touchstone" for determining when a reservist becomes subject to UCMJ jurisdiction. We

are well aware that our superior court specifically rejected this "departure for duty" standard in *United States v. Cline*, 29 M.J. 83, 85 (C.M.A. 1985). We are not adopting a "departure for duty" test for jurisdiction.

In *Cline*, the accused had orders that required him to report at 0500 on 25 April. On 5 April, the accused was told that the reporting time had changed from 0500 to 1600, but was warned that he would be subject to UCMJ jurisdiction one minute past midnight on 25 April. *Id.* at 84. Cline was convicted of committing an offense at 0830, 25 April. He claimed the Air Force had no jurisdiction over him because he did not depart his off base residence to meet the 1600 reporting time until 1535. Our superior court held that, under Article 2(a)(1), UCMJ, Cline was subject to court-martial jurisdiction at 0001 on the date he was called for active duty training.

We are convinced that the orders and the appellant's actions establish jurisdiction under Article 2(a)(1), UCMJ.

Article 2(c)

We also find that the appellant was subject to UCMJ jurisdiction under the provisions of Article 2(c), UCMJ. Article 2(c) extends jurisdiction to persons serving with an armed force who:

(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications . . . at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties.

The facts of this case are clear that the appellant voluntarily submitted to military authority. Art. 2(c)(1), UCMJ. She accepted the military conditions of her travel and the direction to use government quarters, if available, as stated on her orders. The orders specifically authorized, *but did not require*, a travel day from the appellant's home in Pittsburgh, Pennsylvania, to Wright-Patterson AFB. The appellant had the option of traveling to the base on 11 July and simply filing for mileage. She also had the option of driving from her home to Wright-Patterson AFB on 12 July, the day her 12 days of training began. However, the appellant elected a third option, which was accepting the authorized travel day, and, as we discuss in more detail below, she elected to file for and receive the normal travel reimbursements, as well as active duty pay and allowances for that day of travel. In completing her orders, at the end of her tour, the appellant specifically noted that her tour of duty began on 11 July.

The evidence is undisputed that the appellant met the mental competence and minimum age requirement to serve on active duty. Art. 2(c)(2), UCMJ.

The appellant accepted the authorized travel day, and applied for and received full military pay and allowances for that day. This included base pay, basic allowance for quarters, and basic allowance for subsistence, as well as reimbursement for the government quarters and travel expenses. Perhaps even more significantly, she received one reserve point for the travel day, which would have eventually increased her retirement pay. Art. 2(c)(3), UCMJ.

Finally, the appellant performed military duties on the travel day. Art. 2(c)(4). When she accepted the optional travel day, she voluntarily undertook a duty to travel from her home to Wright-Patterson AFB. Travel is a normal part

of military duty. In the discharge of that duty, it was incumbent upon the appellant to adhere to military standards and to the UCMJ. Few could question that "[p]hysical and mental fitness are the quintessential requirements of military readiness. The use of illegal drugs significantly diminishes the user's physical and mental capabilities." *United States v. Jackson*, 48 M.J. 292, 295 (1998). Military readiness requires military members, reserve and active duty, to refrain from the use of illegal drugs at all times.

The appellant admitted in a written statement to AFOSI agents that she ate five brownies on the evening of 10 July, at her home, and three more brownies on the evening of 11 July in Wright-Patterson AFB officer quarters "before reporting to duty the next day, on Monday July 12, 1999, at WPMC [Wright-Patterson Medical Center]." She also admitted that she knew the brownies contained a "large amount of illegal substance (marijuana)." As to the probable effect of her marijuana use, the appellant wrote, "I do still enjoy the effects of the use and I know after years of this [marijuana use] *the accumulation of THC would be high in urine*." (Emphasis added). Even though the parties stipulated that the appellant performed her duties on 12 July without incident, common sense and the appellant's own admissions establish that she knew high amounts of THC would be present in her urine that morning.

CONCLUSION

The "critical issue" is one of the appellant's status. The Supreme Court recognized that military jurisdiction exists over a service member for crimes committed on or off base as a result of the individual's status as a member of the armed forces. *Id.* (citing *Solorio v. United States*, 483 U.S. 435 (1987)). By applying the language of Article 2(a)(1) and the four criteria of Article 2(c) in a common sense and

straightforward manner, consistent with plainly stated congressional intent to subject reservists to UCMJ jurisdiction to the same extent as active duty members, the appellant's status made her subject to the UCMJ on 11 July 1999.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Accordingly, the approved findings and sentence are

AFFIRMED.

PECINOVSKY, Judge (concurring in part, dissenting in part):

I respectfully dissent from the majority opinion's holding that the court-martial had in personam jurisdiction over the appellant's wrongful use of marijuana, and would set aside the finding of guilty on that specification and charge. However, because the appellant's approved sentenced [*sic*] was for only 45 days' confinement and a dismissal for the more grievous offenses of making a false official statement to AFOSI special agents and dishonorably soliciting a junior officer to substitute her urine for appellant's urine for drug testing purposes, I concur with the majority's affirmance of the appellant's sentence.

The appellant was ordered to active duty to perform her annual training from 12 July 1999 to 23 July 1999. These orders also authorized, but did not require, one additional travel day. The appellant did avail herself of the authorized travel day, and admitted to using marijuana on that day in government quarters at Wright-Patterson AFB on 11 July 1999.

The critical issue is one of status. *Cline*, 29 M.J. at 85. We must look to the statutory language of Article 2, UCMJ, to determine the appellant's status for court-martial jurisdiction purposes. *Id.* The majority is correct in its focus upon the language of Article 2(a)(1) which provides for court-martial jurisdiction over "other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it." Art. 2(a)(1), UCMJ.

The majority holds that based upon the circumstances of this case, the appellant met the requirements of Article 2(a)(1). She availed herself of the authorized travel day, stayed in military quarters, accepted pay, and received one reserve point towards a reserve retirement. However, these circumstances do not meet the statutory requirements of Article 2(a)(1). Jurisdiction under Article 2(a)(1) attaches "*from the dates when* they are required by the terms of the call or order to obey it." *Cline*, 29 M.J. at 85 (emphasis in original). The appellant was called to active duty from 12 July 1999 to 23 July 1999. Although she utilized her travel day, she was not *required* to travel on 11 July 1999. The duty requirement of the annual tour order began at "one minute past midnight" on 12 July 1999. *Id.* at 86. As in *Cline*, the appellant "was subject to the Code and military jurisdiction from that time." *Id.* at 86.

The statutory basis for the appellant's annual tour order is 10 U.S.C. § 10147(a)(1), which provides that members of the Ready Reserve are required to "serve on active duty for training of not less than 14 days (exclusive of travel time) during each year." Travel time, in connection with an annual tour, is not considered active duty service under this provision. Since Article 2(a)(1) contemplates court-martial jurisdiction for periods of active duty, an offense committed during a non-active duty travel day, is therefore, not subject to trial by court-martial.

In *Cline*, the appellant, also a reservist, was ordered to active duty on 25 April 1987. He committed a criminal offense of the wrongful distribution of marijuana at 0830, but did not report in for duty until 1600 on 25 April 1987. His conviction was affirmed because he "was arrested for an offense committed on the day of his activation, not the day before." *Cline*, 29 M.J. at 86. Here, the appellant committed her offense on the day before activation, and court-martial jurisdiction does not attach under Article 2(a)(1).

In the alternative, the majority finds that the appellant voluntarily submitted to military jurisdiction on 11 July 1999 under the provisions of Article 2(c), UCMJ. Then, the majority holds that the requirements of Article 2(c) were substantially met and court-martial jurisdiction was properly exercised. The problem with finding jurisdiction under Article 2(c), is that court-martial jurisdiction is not solely dependent upon voluntary submission to military authority. Article 2(c) confers court-martial jurisdiction for a person serving with an armed force who:

(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications . . . at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties.

United States v. Ernest, 32 M.J. 132, 139 (C.M.A. 1991). Where are the military duties performed by the appellant on 11 July 1999?

In *Ernest*, the Court concluded that Article 2(c) was adequate to confer jurisdiction "under the facts of this case." *Id.* The Court noted that there was no doubt that the appellant requested orders to active duty and voluntarily reported for

active duty on 18 February 1988, the date beginning his active duty, as stated in his orders. *Id.* at 120. The appellant was qualified by age and mental competence for duty, but it was "also clear that he performed military duties" on 18 February 1988. *Id.* Based upon these factors, including the fact that he "performed military duties," the Court determined that the "requirements of Article 2(c) were substantially met in this case." *Id.*

Was the appellant in the present case performing military duties in traveling to Wright-Patterson AFB on her travel day or by checking into billeting? The answer is no. She was not required to travel on her authorized travel day and was not required to check into billeting on that day. She would not have been subject to prosecution under Article 92, UCMJ, 10 U.S.C. § 892, for dereliction of those "duties." The bottom line is that the appellant performed no military duties on 11 July 1999, subjecting her to court-martial jurisdiction under the constructive enlistment provisions of Article 2(c).

The majority opinion finds a military duty in traveling from her home to Wright-Patterson AFB and in refraining from using illegal drugs. The problem with finding Article 2(c), UCMJ, jurisdiction for these "military duties" is that every reservist has these "duties" at all times. If a reservist, not on active duty orders, commits the federal criminal offense of possession of a controlled substance, in violation of 21 U.S.C. § 844, the commission of this offense does not subject the reservist to UCMJ jurisdiction. It simply subjects the reservist to possible administrative discharge, as well as possible federal prosecution in federal district court. Here, while the appellant did use illegal drugs, the commission of this federal criminal act and the violation of her "military duty" to refrain from committing this act does not subject her to UCMJ jurisdiction. The commission of this offense, while not on active duty

orders, simply makes her subject to administrative discharge and prosecution in federal district court.

Similarly, every reservist ordered to perform an annual tour has a "duty" to travel to the duty assignment, whether on the travel day or on the actual duty day. In *Cline*, the reservist committed a criminal act prior to beginning his travel to his duty station. *Cline*, 29 M.J. at 84. The argument that "departure for duty" is the touchstone for determining UCMJ jurisdiction was rejected by our superior appellate court. *Id.* at 84-85. The majority opinion's crafting of a "military duty" from the appellant's "departure for duty" ignores the clear language in *Cline,* rejecting "departure for duty" as dispositive as to the initiation of UCMJ jurisdiction. Here, as in *Cline*, UCMJ jurisdiction attached "one minute past midnight" on the first duty day of the annual tour order, not when the appellant departed for duty. *Id.* at 86.

Absent jurisdiction under either Article 2(a)(1) or Article 2(c), I would set aside the finding of guilt for the marijuana offense committed on the appellant's travel day. However, while the finding falls, the sentence does not. The appellant's approved sentence was for only 45 days' confinement and a dismissal. She was properly convicted for the more grievous offenses of making a false official statement to AFOSI agents and dishonorably soliciting a junior officer to substitute her urine for the appellant's urine for drug testing purposes. Her sentence was appropriate for these remaining serious offenses and I concur with the majority in affirming the sentence.

OFFICIAL

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